

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE MOSHI DISTRICT REGISTRY
AT MOSHI**

(PC) CIVIL APPEAL No. 07 OF 2021

(C/f Appeal No. 18 of 2020 from the District Court of Moshi at Moshi,
Originating from Civil Case No. 71 of 2020 of Uchira Primary Court)

DANIEL GODWIN MAMKWEAPPELLANT

VERSUS

PAUL TEMURESPONDENT

JUDGMENT

27/7/2021, 21/9/2021.

T. MWENEMPAZI – J

Daniel Godwin Mamkwe, the appellant herein, instituted a civil suit against Paul Temu, the respondent herein, at Uchira Primary Court for a claim of TZS 1,326,000/=. In judgment delivered on 30/10/2020, the Primary Court was satisfied that the claim was proved and ordered the respondent to pay the whole amount as claimed. Aggrieved the respondent herein appealed to the District Court of Moshi which decided that the Primary Court had no



territorial jurisdiction because the cause of action arose at Mwika and not Uchira. In reaching its decision the appellate court was guided by the provision of section 18 of the Civil Procedure Code [CAP 33 R.E. 2019. The respondent's appeal was therefore allowed.

Aggrieved by the decision of the first appellate court the appellant preferred a second appeal before this court based on four grounds as follows: -

- 1. That the Appellate District Court erred both in law and in fact when failed to take into account that the Uchira Primary court vested with territorial jurisdiction to entertain the case and as a result reached wrong and unfair decision.*
- 2. That the Appellate Senior Resident Magistrate erred both in law and in fact when failed to take into consideration that the case was proved on the balance of probabilities as required by the law on the strength of evidence of PW1, PW2, PW3, PW4 and PW5 which was not at all rebutted by the Respondent and as a result justice was strongly defeated.*
- 3. That the Appellate District Court erred both in law and in fact when failed to take into consideration that the trial court decision was full of legal reasoning on the strength of issues framed and fully proved*



during the hearing of the case and as a result caused justice jeopardized and violated.

4. That the appellate District Court erred both in law and in fact when entertained the appeal under Civil Procedure Code which is not at all applicable in Primary Courts instead of Magistrates Courts Act.

This Court ordered the matter to be heard by way of written submissions. Submitting on the first ground of appeal the appellant stated that, the appellate District Court totally erred both in law and in fact by applying the Civil Procedure Code Cap 33 R.E 2019 in its decision while such law is not applicable in Primary Courts. He maintained that in the circumstance, the appellate District Court ought to have used the Magistrates' Court Act, Cap 11 of the law. For this reason, he prayed for the appeal to be allowed. On the second and third grounds he submitted that it is a matter of fact that civil case be proved on the balance of probabilities and as required by the law the evidence given by his witnesses was strong and was never rebutted by the respondent during hearing of the case. He further submitted that the case on his side remained intact and unshaken so he prayed for the appeal to be allowed with costs.

Finally appellant submitted that the District Court wrongly applied Civil Procedure Code as it was not applicable in this case. He concluded that the



Civil Procedure Code is only applicable to all proceedings in the High Court of the United Republic, courts of Resident Magistrates and District Courts.

In response, the respondent submitted that the issues of jurisdiction are matters of law and not matters which can be vested by the choice of parties.

He cited the Fourth Schedule to the Magistrates Courts Act Cap 11 R.E 2019 which relates to the Civil Jurisdiction of Primary Courts paragraph 1 which states that,

“Subject to the provisions of this Act, proceedings of the civil nature shall be heard and determined –

(a).....

(b) In any other case, by a court within the local jurisdiction of which the cause of action arose or the defendant is ordinarily resident ...”

The respondent further submitted that he resides in Mamba Kusini and by then he was working for gain at Mwika and the cause of action is alleged to have arisen in Mwika and there are Primary Courts both in Mwika and in Mamba Kusini. He argued that the appellant herein does not as well reside in Uchira but in Kirua Vunjo.



He also submitted that jurisdiction is creature of the law and should be adhered to in whatsoever case to make sure that the court which is to make decision is vested with those powers given by law. He further argued that in the present case the law on jurisdiction was not adhered and hence the decision was made by the Court which was not competent as the cause of action did not arise in Uchira and he also does not reside in Uchira or work for gain in Uchira.

Respondent also submitted that the appellate Magistrate was very proper in allowing the appeal as the decision of the Trial Magistrate had no legal reasoning sufficient to maintain the decision as the same was not supported by evidence that would possibly prove the case on the balance of probabilities as required by the law. He argued that during trial he testified that for the claim of 380,000/= there was a written contract but appellant failed to prove the same by tendering any valid written contract evidencing the terms which was very necessary. He concluded that the decision of first appellate Magistrate was very proper to allow appeal as the decision of the Primary Court was full of irregularities and unreasoned let alone the issues of jurisdiction.

I have gone through both parties' submissions, the trial courts record and the decision of the first appellate court. In determining whether this second

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appeal has merit I will discuss the grounds of appeal as raised by the appellant.

The first ground of appeal is with respect to the issue of territorial jurisdiction of the trial court. The term jurisdiction is defined in **Halsbury's Laws of England**, Vol. 10, para. 314 to mean:

*"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. **The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means.** If no restriction or limitation is imposed the jurisdiction is said to be unlimited."* (Emphasis added).

Now, based on the above definition and as rightly submitted by the respondent, jurisdiction is a matter of law and not otherwise. This means jurisdiction of the court must be provided by the law. For this matter the trial court being a primary court its territorial jurisdiction is governed by the law that established it which is the **Magistrates' Courts Act [CAP 11 R.E. 2019]**. Under section 3(1) of the act, it is provided that,

'There are hereby established in every district primary courts which shall, subject to the provisions of any law for



*the time being in force, **exercise jurisdiction within the respective districts** in which they are established”*
(emphasis added).

Based on the above cited legal provisions, the territorial jurisdiction of the primary court is limited to the district in which it is established. Accordingly, it was held in the case of **Shyam Thanki and Others V New Palace Hotel** [1971] 1 EA 199 at 202 that;

“All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess.”

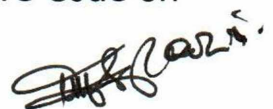
So, in line with the above cited legal provision and the case law, the issue of jurisdiction is so fundamental and the courts are therefore required as a matter of practice to be certain and assured of their jurisdictional position at the commencement of the trial.

In the present case therefore, in order to determine whether the trial court had the required territorial jurisdiction to entertain the matter according to the law, two things are to be looked at; that is, the defendant’s residence and the place where the cause of action arose. This is provided for in the Fourth Schedule to the Magistrates Courts Act Cap 11 R.E 2019 under section 1 (b) that, the proceedings of the civil nature shall be heard and determined

by a court within the local jurisdiction of which the **cause of action arose** or **the defendant is ordinarily resident**, or by a court to which proceedings have been transferred under, or by an order made under Part V of the Act.

According to the records it is clear that the Respondent was residing at Mamba Kusini. Therefore since there is Mamba Primary Court this was the proper court in so far as territorial jurisdiction is concerned and not the Uchira Primary Court. For this reason it is clear that the trial court had no territorial jurisdiction to hear the matter.

Being significant as already explained hereinabove, the issue of jurisdiction if ignored, it can be raised at any stage of hearing even on appeal if not considered during trial. The first appellate court rightly considered the issue of jurisdiction however it erred on its findings when it referred to the law which was not applicable in the premises that is in primary court. This takes us to the fourth ground of appeal. The law which the district court made reference to in its decision was section 18 of the Civil Procedure Code [CAP 33 R.E. 2019] As correctly submitted by the appellant it was wrong for the district court to apply the Civil Procedure Code in this case because the same is not applicable in primary courts. I do agree with the appellant that it was absolutely wrong for the first appellate court to use Civil Procedure Code on



the matter originating from Primary Court, because the applicable law is **Magistrates' Courts Act Cap 11 R.E 2019**. This position was also clarified by the Court of Appeal of Tanzania when faced with similar predicament in the case of **JULIUS PETRO v COSMAS RAPHAEL** [1983] TLR 346 (CA) where it was held inter alia, that;

“The Civil Procedure Code Act No. 498 of 1966 does not apply to the High Court when hearing appeals originating from Primary Courts. It applies to the High Court, Resident Magistrates' Court and District Courts when they exercise original civil jurisdiction and also applies when the High Court hears appeals originating from the District Court or Resident Magistrates' Court;”

Based on the above explanation the fourth ground of appeal is therefore meritorious. However, although this ground is meritorious the issue of jurisdiction still does not favor the appellant. As explained earlier that even if the Magistrates Courts Act is the proper law applicable, the trial court would still lack the jurisdiction to hear the matter because the court is not located in the district where the cause of action arose or where the defendant was originally residing.

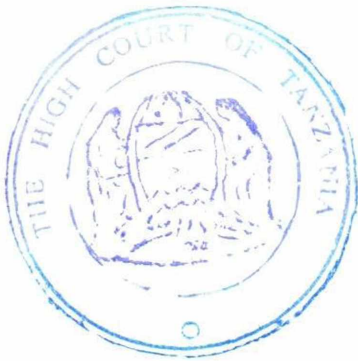
In my view since the issue of jurisdiction is fundamental it goes to the root of the matter. Having determined the issue of jurisdiction as discussed



above, I find that it was not safe for the court to proceed with the trial of a case on the assumption that the court had jurisdiction to adjudicate upon the case.

Therefore, I consider this appeal to be lacking in merit and the same is hereby dismissed with no order as to costs.

Dated and delivered at Moshi this 21th day of September, 2021.




T. MWENEMPAZI
Judge
21/09/2021